# TEXT OF COMMENTS TO SECTIONS AFFECTED BY 2008 COMMISSION RECOMMENDATIONS

**CLRC Staff Note.** This document sets out the text of Official Comments to three Commission-sponsored bills enacted in the 2008 legislative session — 2008 Cal. Stat. chs. 56, 174, and 231. The source for each Comment is given in the accompanying Table of Sections Affected by 2008 Commission Legislation.

Direct any questions to Brian Hebert at 916-739-7071 or bhebert@clrc.ca.gov.

# CODE OF CIVIL PROCEDURE

#### § 396 (repealed). Court without jurisdiction

**Comment.** Section 396 is repealed due to trial court unification. The provision directed a court not to dismiss but to transfer a case if the court lacked subject matter jurisdiction and another state court would have such jurisdiction. The provision was often invoked when a municipal court transferred a case outside its jurisdiction to the superior court, or vice versa. See, e.g., Walker v. Superior Court, 53 Cal. 3d 257, 807 P.2d 418, 279 Cal. Rptr. 576 (1991); Cal. Employment Stabilization Comm'n v. Municipal Court, 62 Cal. App. 2d 781, 145 P.2d 361 (1944). After unification of the municipal and superior courts, it no longer served that purpose.

There was a split of authority regarding whether the provision authorized a superior court lacking jurisdiction to transfer a case to a court of appeal or the state Supreme Court. Compare TrafficSchoolOnline, Inc. v. Superior Court, 89 Cal. App. 4th 222, 225, 107 Cal. Rptr. 2d 412 (2001) ("[T]he superior court is not vested with the authority by Code of Civil Procedure Section 396 to transfer a case to the Court of Appeal or the Supreme Court."), with Padilla v. Dep't of Alcoholic Beverage Control, 43 Cal. App. 4th 1151, 1154, 51 Cal. Rptr. 2d 133 (1996) (Transfer requirement of Section 396 applies "in the case of proceedings filed in the superior court which, by statute, may be filed only in the Supreme Court or the Court of Appeal."); see also Pajaro Valley Water Mgmt. Agency v. McGrath, 128 Cal. App. 4th 1093, 1104 n.4, 27 Cal. Rptr. 3d 741 (2005) ("It is possible, though a point of disagreement, that [Section 396] retains vitality as empowering the *superior* court to transfer cases within the exclusive original jurisdiction of the *appellate* courts." (emphasis in original)).

Consistent with the key policy of deciding a case on its merits even if it is filed in the wrong tribunal, new Section 396 makes clear that if a superior court lacks jurisdiction of a matter and a state appellate court would have jurisdiction, the superior court must transfer the matter instead of dismissing it.

# § 396 (added). Court without jurisdiction

**Comment.** Section 396 requires a superior court to transfer an appeal or petition over which the superior court lacks jurisdiction to an appellate court that has jurisdiction. The provision continues a policy that requires transfer and prohibits dismissal of a cause simply because it was filed in the wrong court. See, e.g., former Section 396 (2002 Cal. Stat. ch. 806, § 9); Gov't Code § 68915; see Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 268-69, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972); Morgan v. Somervell, 40 Cal. App. 2d 398, 400, 104 P.2d 866 (1940).

#### Heading of Chapter 12 (commencing with Section 2029.010) (amended)

**Comment.** To improve clarity, the heading of Chapter 12 is amended to replace the reference to "Deposition" with a reference to "Discovery." This change helps to emphasize that the chapter

applies not only to an oral deposition, but also to other forms of discovery. For example, the chapter applies to a deposition solely for the production of business records (see Sections 2020.010(a)(3), 2020.410-2020.440), yet in some jurisdictions such a procedure might not be referred to as a "deposition."

#### § 2029.010 (repealed). Deposition in action pending outside California

**Comment.** Former Section 2029.010 is superseded by enactment of the Interstate and International Depositions and Discovery Act (Sections 2029.100-2029.900).

#### § 2029.100 (added). Short title [UIDDA § 1]

**Comment.** Section 2029.100 is similar to Section 1 of the Uniform Interstate Depositions and Discovery Act (2007) ("UIDDA"). This article differs in two significant respects from UIDDA: (1) it addresses procedural details not addressed in UIDDA (see Sections 2029.300, 2029.350, 2029.390, 2029.600, 2029.610, 2029.620, 2029.630, 2029.640, 2029.650), and (2) it governs discovery for purposes of an action pending in a foreign nation, not just discovery for purposes of an action pending in another jurisdiction of the United States (see Section 2029.200(a)(2) & Comment).

The entire article may be referred to as the "Interstate and International Depositions and Discovery Act." The portions of the article that are drawn from the Uniform Interstate Depositions and Discovery Act may collectively be referred to as the "California version of the Uniform Interstate Depositions and Discovery Act." See Section 2029.700 (uniformity of application and construction).

# § 2029.200 (added). Definitions [UIDDA § 2]

**Comment.** Section 2029.200 is the same as Section 2 of the Uniform Interstate Depositions and Discovery Act (2007), except that (1) the definition of "foreign jurisdiction" in subdivision (a) includes a foreign nation, not just a state other than California, and (2) the term "Virgin Islands" is substituted for "United States Virgin Islands" in subdivision (d), because "Virgin Islands" is the official name for the entity in question.

Subdivision (c) defines "person" broadly. This is consistent with the general code-wide definition in Section 17 ("the word 'person' includes a corporation as well as a natural person"). For guidance on interpreting other provisions of this code referring to a "person," see Hassan v. Mercy American River Hospital, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623 (2003) (whether "person" as used in particular section of Code of Civil Procedure includes corporation or non-corporate entity "is ultimately a question of legislative intent"); Diamond View Limited v. Herz, 180 Cal. App. 3d 612, 616-19, 225 Cal. Rptr. 651 (1986) ("[T]he preliminary definition contained in section 17 is superseded when it obviously conflicts with the Legislature's subsequent use of the term in a different statute."); Oil Workers Int'l Union v. Superior Court, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is "person" for purpose of statutes in Code of Civil Procedure governing contempt).

To facilitate discovery under this article, subdivision (e) defines "subpoena" broadly. The term includes not only a document denominated a "subpoena," but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

# **Background from Uniform Act**

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the Federal Rules of Civil Procedure.

The term "Subpoena" does not include a subpoena for the inspection of a person (subdivision (e)(3) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the Federal Rules of Civil Procedure). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. Extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

[Adapted from UIDDA § 2 comment & § 3 comment.]

# § 2029.300 (added). Issuance of subpoena by clerk of court [UIDDA § 3]

**Comment.** Section 2029.300 is added to clarify the procedure for obtaining a California subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivisions (a), (c), and (d)(1)-(2) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions (b) and (d)(3)-(5) address additional procedural details.

To obtain a subpoena under this section, a party must submit the original or a true and correct copy of a "foreign subpoena." For definitions of "foreign subpoena" and "subpoena," see Section 2029.200 (definitions). The definition of "subpoena" is broad, encompassing not only a document denominated a "subpoena," but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance in the California courts. For further guidance on avoiding unauthorized practice of law, see Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. Birbrower v. Superior Court, 17 Cal. 4th 119, 127, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998) ("[P]ersons may represent themselves and their own interests regardless of State Bar membership...."); Cal. R. Ct. 9.47; Final Report and Recommendations, supra, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.350 (issuance of subpoena by local counsel), 2029.640 (discovery on notice or agreement).

# **Background from Uniform Act**

The term "Submitted" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in California (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the California county in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a California subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in California, who will take the completed and executed Kansas subpoena and the completed but not yet executed California subpoena to the clerk's office in California. The clerk of court, upon being given the Kansas subpoena, will then issue the

identical California subpoena. The process server (or other agent of the party) will pay any necessary filing fees, and then serve the California subpoena on the deponent in accordance with California law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. [Note: In California, an application form would also be required.] There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

The Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

[Adapted from UIDDA § 3 comment.]

# § 2029.350 (added). Issuance of subpoena by local counsel

**Comment.** Section 2029.350 is added to make clear that if certain conditions are satisfied, local counsel may issue process compelling a California witness to appear at a deposition for an action pending in another jurisdiction.

To issue a subpoena under this section, a California attorney acting as local counsel must receive the original or a true and correct copy of a "foreign subpoena." For definitions of "foreign subpoena" and "subpoena," see Section 2029.200 (definitions). The definition of "subpoena" is broad, encompassing not only a document denominated a "subpoena," but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

This section does not make retention of local counsel mandatory. For guidance on that point, see Section 2029.300(a); Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. Birbrower v. Superior Court, 17 Cal. 4th 119, 127, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998) ("[P]ersons may represent themselves and their own interests regardless of State Bar membership...."); Cal. R. Ct. 9.47; Final Report and Recommendations, supra, at 24. Different considerations may apply, however, if a discovery dispute arises in

connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.300 (issuance of subpoena by clerk of court), 2029.640 (discovery on notice or agreement).

#### § 2029.390 (added). Judicial Council forms

**Comment.** Section 2029.390 is new. The Judicial Council is to prepare forms to facilitate compliance with this article.

#### § 2029.400 (added). Service of subpoena [UIDDA § 4]

**Comment.** Section 2029.400 is similar to Section 4 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.400 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350.

# § 2029.500 (added). Deposition, production, and inspection [UIDDA § 5]

**Comment.** Section 2029.500 is similar to Section 5 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.500 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350 and to discovery taken in this state pursuant to properly issued notice or by agreement.

# **Background from Uniform Act**

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

[Adapted from UIDDA § 5 comment.]

# § 2029.600 (added). Discovery dispute [UIDDA § 6]

**Comment.** Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and Discovery Act (2007). It serves to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction.

The objective of subdivision (a) is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state. In particular, the state must be able to protect its residents from unreasonable or unduly burdensome discovery requests. A court should interpret the provision with this objective in mind.

Subdivision (b) makes clear that a request for relief pursuant to this section is properly denominated a "petition," not a "motion." For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a "petition" to enforce the subpoena, not a "motion" as Section 1985.3(g) prescribes for a case pending in California.

See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition).

#### § 2029.610 (added). Fees and format of papers relating to discovery dispute

**Comment.** Section 2029.610 is added to clarify procedural details for resolution of a dispute relating to discovery under this article.

See also Sections 2029.600 (discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition).

# § 2029.620 (added). Subsequent discovery dispute in same case and county

**Comment.** Section 2029.620 is added to clarify the procedure that applies when two or more discovery disputes relating to the same out-of-state proceeding arise in the same county. To promote efficiency and fairness and minimize inconsistent results, all documents relating to the same out-of-state case are to be filed together, bearing the same California case number.

In addition, subdivision (b) requires the first page of a subsequent petition to clearly indicate that it is not the first petition filed in the court relating to the out-of-state case. If the petitioner does not know the history of the case, the petitioner has a duty to determine whether a previous petition has been filed. That duty should not be difficult to satisfy, because the petitioner has an obligation to meet and confer with the other disputant before seeking relief in court.

Section 2029.620 does not apply when discovery disputes relate to the same out-of-state case but arise in different counties. In that situation, each petition for relief must be filed in the superior court of the county in which the deposition is being taken. See Section 2029.600. In appropriate circumstances, a petition may be transferred and consolidated with a petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court should consider factors such as convenience of the deponent and similarity of issues.

See also Sections 2029.600 (discovery dispute), 2029.610 (fees and format of papers relating to discovery dispute), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition).

#### § 2029.630 (added). Hearing date and briefing schedule

**Comment.** Section 2029.630 is added to clarify the proper hearing date and briefing schedule for a petition under Section 2029.600 or 2029.620. The petition is to be treated in the same manner as a discovery motion in a case pending within the state.

# § 2029.640 (added). Discovery on notice or agreement

**Comment.** Section 2029.640 is added to clarify how this article applies when a party to a proceeding pending in another jurisdiction seeks discovery from a witness in this state by properly issued notice or by agreement. See also Section 2029.500 (deposition, production, and inspection).

#### § 2029.650 (added). Writ petition

**Comment.** Section 2029.650 is added to clarify the procedure for reviewing a decision of a superior court on a dispute arising in connection with discovery under this article. For further guidance on that procedure, see in particular Cal. R. Ct. 8.264(a)(1) (when relevant, clerk of court of appeal shall promptly send court of appeal's opinion or order to lower court), 8.272(b) (transmittal of remittitur and opinion or order to lower court), 8.490(k) (notice to trial court with regard to writ), 8.490(f)(1) (writ petition shall be served on respondent superior court).

# $\S$ 2029.700 (added). Uniformity of application and construction [UIDDA $\S$ 7]

**Comment.** Subdivision (a) of Section 2029.700 provides a convenient means of referring to the sections within this article that are drawn from the Uniform Interstate Depositions and Discovery Act (2007). The entire article may be referred to as the "Interstate and International Depositions and Discovery Act." See Section 2029.100 & Comment.

Subdivision (b) is similar to Section 7 of the Uniform Interstate Depositions and Discovery Act.

## § 2029.800 (added). Application to pending action [UIDDA § 8]

**Comment.** Section 2029.800 is the same as Section 8 of the Uniform Interstate Depositions and Discovery Act (2007), except "or after" is inserted to improve clarity and "operative date" is substituted for "effective date."

In California, "effective date" refers to the date on which a statute is recognized as constituting California law. In contrast, "operative date" refers to the date on which the statute actually becomes operative. See, e.g., People v. Palomar, 171 Cal. App. 3d 131, 134 (1985) ("The 'enactment is a law on its effective date only in the sense that it cannot be changed except by legislative process; the rights of individuals under its provisions are not substantially affected until the provision operates as law."").

The effective date of this article is January 1 of the year following its enactment. See Cal. Const. art. IV, § 8(c)(1); Gov't Code § 9600(a). Usually, the operative date of a statute is the same as the effective date. People v. Henderson, 107 Cal. App. 3d 475, 488 (1980). In some instances, a statute may specify a different operative date. Cline v. Lewis, 175 Cal. 315, 318; Johnston v. Alexis, 153 Cal. App. 3d 33, 40 (1984). Here, the operative date for this article (except for Section 2029.390) is delayed to allow time for the Judicial Council to prepare forms pursuant to Section 2029.390. See Section 2029.900.

## § 2029.900 (added). Operative date [UIDDA § 9]

**Comment.** Section 2029.900 is similar to Section 9 of the Uniform Interstate Depositions and Discovery Act (2007), except that "operative date" is substituted for "effective date" and the operative date for the article (except for Section 2029.390) is delayed to allow time for the Judicial Council to prepare forms pursuant to Section 2029.390. For an explanation of the distinction between "effective date" and "operative date" in California, see Section 2029.800 Comment.

# GOVERNMENT CODE

#### § 16265.1 (amended). Legislative intent

**Comment.** Section 16265.1 is amended to delete obsolete references to justice programs. The funding under this chapter relating to justice programs was to discontinue upon full implementation of the fiscal provisions of the Trial Court Funding Act of 1985. See former Section 16265.6. That has been achieved; the trial courts are now fully funded by the state. See Sections 77200-77213.

#### § 16265.2 (amended). Definitions

**Comment.** Subdivision (c) of Section 16265.2, which defined "county costs of justice programs," is deleted as obsolete. This definition was relevant only to a funding scheme that is no longer in effect. See Section 16265.4 & Comment; former Section 16265.6 (1987 Cal. Stat. ch. 1286, § 3) & Comment.

Paragraph (2) of subdivision (d) (relabeled as subdivision (c)) is amended to correct a grammatical mistake.

Paragraph (8) of the same subdivision is deleted as obsolete. Former Revenue and Taxation Code Section 11003.3 was repealed in 1992. 1992 Cal. Stat. ch. 699, §§ 17-19 (effective Sept. 15, 1992).

#### § 16265.3 (repealed). 1988 funding

**Comment.** Section 16265.3 is repealed as obsolete because it prescribes funding for a past fiscal year.

## § 16265.4 (amended). State funding of county programs

**Comment.** Subdivision (a) of Section 16265.4 is amended to reflect the repeal of former Section 16265.3 (1987 Cal. Stat. ch. 1286, § 3). Formerly, subdivision (a) incorporated the calculation scheme of Section 16265.3 by reference. Due to the repeal of Section 16265.3, the calculation scheme is now stated in subdivision (a) itself.

Subdivision (a) is also amended to delete an obsolete reference to October 31, 1989.

Subdivision (b) is deleted as obsolete. The Director of Finance was to use the funding scheme prescribed in it only until the fiscal provisions of the Trial Court Funding Act of 1985 were fully implemented. See former Section 16265.6 (1987 Cal. Stat. ch. 1286, § 3). That has been achieved; the trial courts are now fully funded by the State. See Sections 77200-77213.

Former subdivisions (c)-(e) are relabeled as subdivisions (b)-(d). Those provisions are also amended to correct cross-references and delete obsolete references to dates in 1989.

#### § 16265.5 (amended). Allocations over \$15,000,000

**Comment.** Section 16265.5 is amended to reflect the repeal of former Section 16265.3 (1987 Cal. Stat. ch. 1286, § 3).

Section 16265.5 is also amended to delete an obsolete reference to justice programs. The funding under this chapter relating to justice programs was to discontinue upon full implementation of the fiscal provisions of the Trial Court Funding Act of 1985. See former Section 16265.6 (1987 Cal. Stat. ch. 1286, § 3). That has been achieved; the trial courts are now fully funded by the state. See Sections 77200-77213.

# § 16265.6 (repealed). Implementation of Trial Court Funding Act of 1985

**Comment.** Section 16265.6 is repealed. It is no longer necessary due to the full implementation of the fiscal provisions of the Trial Court Funding Act of 1985, which provided a scheme of state funding for trial courts of participating counties. See 1985 Cal. Stat. ch. 1607, § 21. Although that Act was repealed in 1988, the trial courts have been fully funded by the state since the enactment of the Lockyer-Isenberg Trial Court Funding Act of 1997. See 1998 Cal. Stat. ch. 146, § 6; Sections 77200-77213; 1997 Cal. Stat. ch. 850, § 46 (enacting Lockyer-Isenberg Trial Court Funding Act); 1988 Cal. Stat. ch. 945, § 9 (repealing Trial Court Funding Act of 1985).

#### § 68618 (repealed). Delay reduction program

**Comment.** Section 68618 is repealed as obsolete. By its own terms, the provision ceased to operate on July 1, 1992.

#### § 70626 (amended). Miscellaneous filing fees

**Comment.** Subdivision (b) of Section 70626 is amended to specify the fee for obtaining a subpoena from a California court to take a deposition in this state for purposes of a proceeding pending in another jurisdiction. If a person seeks multiple subpoenas, a separate fee is payable under this subdivision for each subpoena sought.

Subdivision (c) is added to specify the fee applicable when discovery is taken in this state for an out-of-state case, and a person who is not a party to the out-of-state case petitions for relief in this state. This fee applies only to the first petition that a non-party files in a particular superior court. If that person files another petition in the same court relating to the same out-of-state case, a motion fee is payable under Section 70617(a). See Code Civ. Proc. § 2029.620(c)(2).

# § 71617 (repealed). Municipal court employees

**Comment.** Section 71617 is repealed to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution.

#### PROBATE CODE

#### § 21310. Definitions

**Comment.** Section 21310 is new. Subdivision (a) continues part of the substance of former Section 21300(b).

Subdivision (b)(1)-(5) continues the substance of former Section 21300(b), except that mistake and misrepresentation are no longer included as separate grounds for a direct contest.

Subdivision (b)(6) is consistent with former Sections 21306(a)(3) and 21307(c).

Subdivision (c) continues the substance of former Section 21300(d).

Subdivision (d) restates the substance of former Section 21305(f).

Subdivision (e) is new. Subdivision (e)(1) provides that a protected instrument includes an instrument that contains a no contest clause. That may include an instrument that expressly incorporates or republishes a no contest clause in another instrument. Subdivision (e)(2) is similar to former Section 21305(a)(3).

#### § 21311. Enforcement of no contest clause

**Comment**. Section 21311 is new.

Subdivision (a)(1) generalizes the probable cause exception provided in former Sections 21306 and 21307, so that it applies to all direct contests.

For a direct contest based on Section 6112 or 21350, the probable cause exception requires only that the contestant show probable cause that a beneficiary is a witness described in Section 6112(c) or a "disqualified person" under Section 21350.5.

Subdivision (a)(2) restates the substance of former Section 21305(a)(2). It provides for enforcement of a no contest clause in response to a pleading that contests a transfer of property on the ground that the property was not subject to the transferor's dispositional control at the time of the transfer. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (a)(3) continues former Section 21305(a)(1) without substantive change. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (b) restates the reasonable cause exception provided in former Sections 21306, with two exceptions:

- (1) The former standard referred only to the contestant's factual contentions. By contrast, subdivision (b) refers to the granting of relief, which requires not only the proof of factual contentions but also a legally sufficient ground for the requested relief.
- (2) The former standard required only that success be "likely." One court interpreted that standard as requiring only that a contest be "legally tenable." In re Estate of Gonzalez, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). Subdivision (a) imposes a higher standard. There must be a "reasonable likelihood" that the requested relief will be granted. The term "reasonable likelihood" has been interpreted to mean more than merely possible, but less than "more probable than not." See Alvarez v. Superior Ct., 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1); People v. Proctor, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033). See Section 21310(b) ("direct contest" defined).

# § 21312. Construction of no contest clause

**Comment.** Section 21312 continues former Section 21304 without change.

#### § 21313. Application of common law.

**Comment**. Section 21313 continues former Section 21301 without change.

# § 21314. Effect of contrary instrument

Comment. Section 21314 continues former Section 21302 without change.

# § 21315. Transitional provision

**Comment.** Section 21315 is new. It is similar in effect to the application date provisions of former Section 21305. Section 3 may further limit the application of this chapter to an instrument that became irrevocable prior to the operative date of the chapter. See Section 3(d)-(f), (h). An instrument that is not governed by this chapter would be governed by the law that applied to the instrument prior to the operative date of this chapter. See Section 3(g).

# WELFARE AND INSTITUTIONS CODE

# § 603.5 (amended). Jurisdiction over minor charged with certain motor vehicle offenses

**Comment.** Subdivision (a) of Section 603.5 is amended to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution. Subdivision (a) is further amended to make stylistic revisions.